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No. 165

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

INTERSTATE ROOFING & SUPPLY COMPANY,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, AS AND CONSTITUTING THE BOARD OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTERSTATE ROOFING & SUPPLY COMPANY, *Petitioner,* v. DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, and RICHARD I. JAMES, as and Constituting the Board of the Department of Treasury of the State of Indiana, *Respondents.*	No. ———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Interstate Roofing & Supply Company prays that a writ of certiorari be issued to review the judgment herein of the United States Circuit Court of Appeals for the Seventh Circuit and respectfully shows to this Honorable Court:

OPINION BELOW

The opinion of the lower court (R. 46-51) is reported in 133 F. (2d) 212.

JURISDICTION

The United States Circuit Court of Appeals for the Seventh Circuit affirmed the District Court's judgment for respondents on January 30, 1943 (R. 52). Petitioner filed a timely petition for rehearing (R. 52-59) which was denied on February 17, 1943 (R. 61). A motion by petitioner to recall the mandate and reconsider the decision was denied on June 2, 1943 (R. 69). An order extending the time for filing a petition for certiorari to and including July 16, 1943, was signed by Mr. Justice Murphy on May 3, 1943 (R. 72). This court has jurisdiction under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347 (a).

QUESTIONS PRESENTED

1. Whether petitioner's gross income or a substantial part thereof was from interstate commerce and whether the imposition thereon of the Indiana gross income tax violated the commerce clause, Article I, Section 8 of the Constitution of the United States.

2. Whether all or a substantial part of petitioner's receipts was from sources outside Indiana, and if so, whether the tax did not apply thereto because of the terms of the act and because of the due process clause of the 14th Amendment to the Constitution of the United States.

3. Whether petitioner's receipts prior to April 1, 1937, the effective date of the 1937 amendment of the taxing act, were in any event taxable at the rate of 1% or whether such receipts were taxable only at the rate of ¼ of 1% as being from the "business of * * * compounding or pre-

paring for * * * use, any article or articles, substance or substances, commodity or commodities."

STATEMENT

This action was brought to recover taxes collected by respondents under the Indiana Gross Income Tax Act both as originally enacted in 1933 (Chapter 50, Indiana Acts 1933, Sec. 64-2601, *et seq.*, Burns' Ind. Stats. 1933) and as amended in 1937 (Chapter 117, Indiana Acts 1937, Sec. 64-2601, *et seq.*, Burns' Ind. Stats. 1933, Pocket Sup.). From an adverse judgment in the District Court (R. 30) petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, with the result above stated.

During 1933 to 1939, inclusive, the periods involved herein, petitioner was an Illinois corporation with its principal place of business in Chicago. It had no place of business in Indiana, but was qualified to do business therein (R. 21). Petitioner was engaged in the business of furnishing asphalt or composition shingles and materials and applying them to roofs and sides of houses and other buildings. Petitioner sent its salesmen from Illinois into Indiana who solicited in Indiana contracts with owners of such structures, which provided for the furnishing and application of the shingles. The contracts were rejected or accepted and approved by petitioner in Chicago (R. 23-25). Petitioner purchased the shingles from jobbers or manufacturers outside Indiana, usually on a delivered price basis, and in nearly all instances petitioner transported the shingles on its trucks to its customers' premises in Indiana and there immediately applied the shingles. Payments of the prices specified in the contracts were made in

practically all cases to petitioner's Chicago office (R. 25). The shingles were not custom manufactured and could have been applied by any person experienced or qualified for doing that particular type of work, but all applications were made by petitioner's trained employees (R. 25-26). Petitioner offered to apportion the tax on the basis of activities within and without Indiana, but respondents refused to apportion on any basis (R. 26-28).

Of petitioner's total receipts, the portion representing materials purchased outside Indiana varied during the years involved between 33.44% and 42.70%; installation labor between 17.85% and 21.76%; selling expense between 18.16% and 22.59%; overhead between 12.41% and 25.80%; and profit between .26% and 15.69% (R. 29).

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court in favor of respondents.

2. The Circuit Court of Appeals for the Seventh Circuit erred in denying petitioner's motion to recall the mandate and reconsider the decision.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 82 L. Ed. 1365, wherein it was held that the tax involved violates the commerce clause of Article I, Section 8 of the Constitution of the United States "as applied to receipts from interstate sales" because "the tax includes in its measure, without apportion-

ment, receipts derived from activities in interstate commerce"; and because "the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured."

Petitioner's application of the shingles (representing but from 17% to 21% of the price) was only an incident of interstate sales by a non-resident of Indiana to Indiana customers.*

Allied Mills, Inc. v. *Department of Treasury* (No. 669, this term), 87 L. Ed. 514, is not controlling, as there the taxpayer was a resident of Indiana, had factories in Indiana, and the question as stated by the Indiana Supreme Court, 42 N. E. (2d) 34, 35 (advance sheet), was whether "the incidental interstate nature" of the taxpayer's business entitled it to exemption. Here petitioner had no factory or other place of business in Indiana, purchased no shingles in Indiana, and its business was inescapably, not incidentally, interstate in character.

2. The decison below conflicts with the subsequent decision of the Indiana Supreme Court in *Department of Treasury* v. *International Harvester Co.*, 47 N. E. (2d) 150 (advance sheet), and hence with the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 69, 82 L. Ed. 1188. It was held in the *International Harvester* case that receipts by a non-resident from goods manufactured outside Indiana and sold to Indiana customers pursuant to conditional sales

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* *Nemeth* v. *Becker Roofing Co.* (Mo. App.), 151 S. W. (2d) 559, 560-563; *Primrose Petroleum Co.* v. *Allen* (N. C.), 14 S. E. (2d) 402, 403-404; *McCaskey Register Co.* v. *Mann* (Texas), 273 S. W. 1113, 1114-1116; *Webb* v. *Knoxville Glass Co.* (Ky.), 289 S. W. 260.

orders solicited in and accepted outside Indiana were not from Indiana sources. The taxing act does not purport to reach receipts of a non-resident other than receipts from sources within Indiana. Sec. 64-2602, Burns' Ind. Stats. 1933 and Pocket Supp.

Even under the unsound view of the Circuit Court of Appeals in the instant case that because of petitioner's application of shingles, petitioner's contracts with its Indiana customers were not for sales of goods but were "local" contracts, Illinois clearly was the source of that part of petitioner's receipts represented by activities and transactions occurring therein. An analysis of petitioner's receipts was stipulated by the parties, found by the Master, adopted by the District Court, and is summarized above. The concept of source as the activities which produce or result in income is directly applicable. *Jackling* v. *State Tax Commission* (N. M.), 58 P. (2d) 1167; *In re Kansas City Star Co.* (Mo.), 142 S. W. (2d) 1029, 130 A. L. R. 1168. Otherwise the taxing act as applied here violates the due process clause of the 14th Amendment. *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, 75 L. Ed 879; *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 47, 82 L. Ed. 673; *Butler Brothers* v. *McColgan*, 315 U. S. 501.

3. If petitioner's receipts were not from sales of goods the decision of the Circuit Court of Appeals conflicts with the decision of the Indiana Supreme Court in *Oster* v. *Department of Treasury*, 219 Ind. 315, 37 N. E. (2d) 528.

Sec. 3 (a) of the original act (Chap. 50, Acts of 1933; Sec. 64-2603, Burns' Ind. Stats. 1933) imposed a tax at the rate of ¼ of 1% upon receipts of the "business of * * *

compounding or preparing for sale, profit, or use any article or articles, substance or substances, commodity or commodities." Respondents have contended heretofore and the Circuit Court of Appeals has decided that petitioner's entire receipts were from the performance of construction contracts in Indiana and were taxable at the 1% rate prescribed by section 3 (f) of the 1933 Act upon receipts from the performance of contracts.

In the *Oster* case the Indiana Supreme Court reversed the lower court's judgment which had been affirmed by the Indiana Appellate Court, 33 N. E. (2d) 799, and rejected the Department of Treasury's contention that performance of a contract not resulting in a sale of goods was subject to the 1% rate imposed by section 3 (f) of the 1933 Act upon receipts from personal services and performance of contracts. The taxpayer was engaged in manufacturing, one of the activities mentioned in section 3 (a), but there were no sales of goods. Hence if there were no sales of goods in the instant case the lower rate applies even though contracts were performed, inasmuch as petitioner was engaged in preparing articles or substances for use.

Petitioner submits that the writ should be granted.

Respectfully submitted,

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Respondents.

No. 165

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 165

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY STATEMENT OF MATTERS INVOLVED.

The Facts.

Petitioner's statement of the facts is substantially correct. However, petitioner's statement contains certain conclusions of petitioner.

With respect to petitioner's offer to apportion, referred to by petitioner at page 4 of their petition herein, the Record shows the following:

> "Said defendant Department of Treasury, by letter dated October 27, 1941, refused to consider any apportionment of the receipts in this matter.

"The Department took the view that the activity of the plaintiff was that of a contractor performing a contract within the state of Indiana and as such did not come within the purview of the commerce clause; that the gross income tax law of Indiana with respect to tax upon gross receipts derived from the performance of contracts within the confines of the State of Indiana did not, in the opinion of the Department, permit an apportionment of the tax, and such prohibition did not conflict with the due process clause; it concluded that the weight of authority seemed to justify the assumption that the state in which the contract was fulfilled was entitled to use the entire gross receipts from such a source measuring the tax to be imposed upon activities within the taxing state."

(Finding X, Record, pp. 26-27.)

The Issues.

Petitioner's statements as to the issues and questions presented are substantially correct.

Statutes.

Pertinent sections of the Indiana Gross Income Tax Act of 1933 are set out in an Appendix, *infra*, pp. 19-21.

B.

SUMMARY OF ARGUMENT.

One.

The levy of the tax here does not violate the Commerce Clause.

The State of Indiana is not prohibited by the Commerce Clause of the Federal Constitution from levying its local tax, measured by gross receipts of petitioner from the performance of contracts in Indiana. The performance of petitioner's contracts in Indiana is a purely local activity. (Argument, *infra*, pp. 5-11.)

Two.

The levy of the tax here is not prohibited by the Fourteenth Amendment and is proper under the terms of the state taxing act.

No portion of the transactions taxed occurred outside Indiana. The gross receipts of petitioner from the performance of contracts within Indiana were from purely local sources, and, therefore, the taxes herein were properly paid and collected. (Argument, *infra*, pp. 11-16.)

Three.

The tax at the rate of one per cent. is proper.

Petitioner's receipts prior to April 1, 1937 (under the original Gross Income Tax Act: Chap. 50, Acts of 1933, p. 389, Sec. 64-2601 et seq. Burns' Ind. Stat. Ann. 1933 ed.) properly were taxable at the statutory rate of one per cent. (Argument, *infra*, pp. 17-18.)

ARGUMENT.

The Nature of the Case.

Petitioner brought this action in the District Court to recover taxes paid by it under the provisions of the Indiana Gross Income Tax Act of 1933 and that Act as amended. *Chapter 50, Acts of 1933, p. 389; Chapter 117, Acts of 1937, p. 606: Sec. 64-2601 et seq. Burns' Ind. Stat. Ann. 1933 ed. and Pocket Suppl.*

The District Court referred the case to a Special Master and in due course the Master reported findings of fact and conclusions of law in this case which were adopted by the Court. The conclusions of law were in favor of defendants (respondents) and judgment was rendered accordingly. The Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. 133 Fed. (2d) 212.

The petitioner, Interstate Roofing and Supply Company, is an Illinois corporation, admitted and qualified to do business in Indiana. Petitioner is engaged in the business of furnishing asphalt or composition shingles and materials and applying them to the roofs and sides of buildings in Indiana. Salesmen were sent into Indiana who solicited orders for such work. The contracts were in the form set out in full in the Record herein at pp. 23-25 thereof.

The gross receipts of petitioner from the furnishing and installation of such materials in Indiana upon structures located within said state form the measure of the taxes in controversy here.

It is the position of the State that such gross receipts of petitioner from the performance of its contracts within Indiana are the proper measure of the state tax.

All emphasis is that of respondents unless otherwise stated.

One.

The levy of the tax here does not violate the Commerce Clause.

A. THE GROSS RECEIPTS OF PETITIONER WERE FROM LOCAL ACTIVITIES.

The respondents insist that there is no serious question of interstate commerce involved here. The gross receipts of petitioner, derived in the manner described in the findings of the Court below, properly may be the measure of this state privilege tax, inasmuch as all of said receipts were derived from the performance of work and labor and the furnishing of materials in connection therewith within the State of Indiana.

The contract of petitioner with its Indiana customers, provided, among other things:

> "In accordance with your estimate, please arrange to furnish all labor and material necessary to (description of work) ..... on the premises at ..... *(always an Indiana location)*.
>
> Finding VII, Record, pp. 23-24.

Fairly construed, the contract is one that requires performance in Indiana, and it is evident that any extrastate characteristic of petitioner's business, so far as the performance of these Indiana contracts is concerned, is purely and simply incidental.

The petitioner transacts business in Indiana with a view of receiving special consideration under Indiana laws. Instead of reserving title to the materials sold and installed by it in Indiana until fully paid for, it agrees with each

customer to take his promissory note, evidencing the balance of the contract price and that the materials and workmanship are satisfactory, and the holder of the note is subrogated to any insurance rights of the Indiana property owner. The Indiana property owner agrees that petitioner may enforce all liens against the property until the note has been paid in full. Finding VII, Record, p. 24.

These are, to say the least, unusual conditions to be contained in sales contracts, but are customary in petitioner's business. This contract has no relation to anything that is interstate trade. It relates to matters and things held in Indiana, and only to matters and things fully and completely at rest within the state.

Respondents respectfully submit that this petitioner, so far as its contracts involved herein are concerned, is engaged in a purely local business in Indiana.

B. THIS INDIANA TAX, MEASURED BY PETITIONER'S GROSS RECEIPTS INVOLVED HEREIN, IS NOT PROHIBITED BY THE COMMERCE CLAUSE.

While respondents admittedly contend in this case that the gross receipts of petitioner are from activities strictly local in character, if the transactions are found to have any "interstate" characteristics, respondents submit that petitioner is not engaged in such commerce as Indiana is prohibited from taxing by reason of the Commerce Clause of the Federal Constitution.

The case of *Adams Mfg. Co.* v. *Storen,* 1938, 304 U. S. 307, does not prohibit the application of the Indiana tax

measured by petitioner's gross receipts from contracts performed within Indiana. In that case, this same tax was held to be invalid when laid by the State of Indiana upon receipts from sales of goods manufactured in Indiana and sold in other states.

The *Adams* case establishes the principle that the seller's state is prohibited by the Commerce Clause from imposing a tax on the gross receipts from sales of goods in other states. *McGoldrick* v. *Berwind-White Coal Mining Company*, 1940, 309 U. S. 33, 57.

It is a proposition of law no longer open to question that the mere formation of a contract between persons in different states does not make the contract a subject of protection of the Commerce Clause, at least in the absence of Congressional action, when, as is the case here, the contract is to be completely performed wholly within the boundaries of one state. This is true, although the contract incidentally may affect interstate trade. *McGoldrick* v. *Berwind-White Coal Mining Company*, 1940, 309 U. S. 33; *Western Live Stock* v. *Bureau of Revenue*, 1938, 303 U. S. 250, 251; *Ware & Leland* v. *Mobile Co.*, 1938, 209 U. S. 405, 409; *Paul v. Virginia*, 1869, 8 Wall. 168; *Indiana Farmers Guide* v. *Department*, 1940, 217 Ind. 207, 29 N. E. (2d) 781, 784.

The Commerce Clause does not in terms prohibit state taxation. *Swift* v. *U. S.*, 1905, 196 U. S. 375, 399; *Western Live Stock* v. *Bureau of Revenue*, 1938, 303 U. S. 250, 254.

State taxes, measured by gross receipts, have been uniformly upheld when there has been no possibility that the transactions taxed could bear any greater tax burden

than transactions having absolutely no extrastate characteristics.[1]

It is the *effect* of a local tax upon commerce in which the Court has been interested. In the past, when the possible effect of a state tax has been to place so-called "interstate commerce" at a disadvantage, competitively, with purely local trade, the mere fact that the tax was conditioned on a local event did not save it. Contrariwise, where the *effect* of the tax has been to place transactions having incidental extrastate elements on an equal basis, taxwise, with purely local trade, the tax has been sustained. The tax here is valid and withstands all of the tests prescribed by the Court.

Obviously, the tax in this case is conditioned upon a local event. *Miles* v. *Department of Treasury of Indiana*, 1935, 209 Ind. 172, 199 N. E. 372.[2]

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1 *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148, 152; *Banker Bros. v. Pennsylvania*, 222 U. S. 210; *Wiloil Corporation v. Pennsylvania*, 294 U. S. 169; *Sonneborn Bros. v. Cureton*, 262 U. S. 506; *Graybar Electric Co. v. Curry*, — Ala. —, 189 So. 186; *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33; *Department of Treasury v. Allied Mills, Inc.*, — Ind —, 42 N. E. (2d) 34, affd. — U. S. —, 63 S. Ct. 666; Cf. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435; *Nelson v. Sears, Roebuck & Company*, 312 U. S. 509.

2 In the *Miles*, case, *supra*, the Supreme Court of Indiana said:

> "We conclude that the tax in question is an excise, levied upon those domiciled within the state or on those who derive income from sources within the state upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state." (199 N. E. at 379.) Without any question the gross receipts of petitioner from performing its contracts in Indiana were from Indiana sources, and in fulfilling its contracts petitioner was unquestionably transacting business within Indiana.

See also: Sec. 2, Chapter 117, Acts of the General Assembly of 1937, page 611; Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 ed., Pocket Suppl.; Sec. 2, Chapter 50, Acts of the General Assembly of 1933, page 390; Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 ed.; *Department of Treasury* v. *Allied Mills, Inc.*, 1942, 42 N. E. (2d) 34; *Western Live Stock* v. *Bureau of Revenue*, 1938, 303 U. S. 250, 254.

The matter which the statute authorizes as the taxable activity is the thing which occurs in Indiana in doing business within the State or deriving income from sources within the State.

The Indiana statute involved herein levies a tax

> "Measured by the amount or volume of gross income * * *. Such tax shall be levied * * * upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana but are engaged in business in this state, or who derive gross income from sources within this state * * *."

Sec. 2, Chap. 50, Acts of 1933, p. 390; Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 ed. The 1937 amendment does not change the nature of the tax. (See: Appendix, *infra*, page 21.)

All of petitioner's gross receipts were derived from the performance of its contracts within Indiana. (Finding VII, Record, pp. 23-24.) Therefore, petitioner was plainly subject to the Acts because it was engaged in business within Indiana and deriving gross income from Indiana sources. The taxes here, levied pursuant to ample state power and not prohibited by any constitutional provisions,

sought to be invoked by petitioner, were properly paid and collected.

The case of *Allied Mills, Inc.* v. *Department of Treasury*, 42 N. E. (2d) 34, 63 S. Ct. 666, 87 L. ed. 514, supports the position of respondents, and is of no aid to petitioner.

The case of *Department of Treasury* v. *International Harvester Company*, 47 N. E. (2d) 150, does not support the position of petitioner. The Indiana Supreme Court described Class A Sales as

> "Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without direction from the purchasers, the goods were shipped to them in Indiana from branches, warehouses or factories located outside Indiana."

This is the class of sale about which the Indiana Supreme Court said: "We cannot say that income so received by appellees was derived from sources within the State of Indiana."

Here, the factual situation is substantially different. The taxpayer installs equipment which it manufactured outside Indiana on the buildings of its Indiana customers in Indiana. Its entire gross receipts are received from the performance of work and labor and the furnishing of materials incident thereto in Indiana. So far as petitioner's contracts are concerned, nothing is required of it that it does not do in Indiana. Because of the substantial difference in the factual situation in the *International Har-*

vester Company case and here the case cited by petitioner is neither applicable nor controlling in this case.

Two.

The levy of the taxes here is not prohibited by the Fourteenth Amendment and is proper under the terms of the taxing act.

The Gross Income Tax Act levies "a tax, measured by * * gross income * * * derived from sources within the State of Indiana of all persons and/or companies * * * who are not residents of the State of Indiana, but are engaged in business within the state, or who derive gross income from sources within this state * * *." *Sec. 2, Chap. 50, Acts of General Assembly of 1933.* (The 1937 amendment to the Act, Chap. 117, Acts of the General Assembly of 1937, is substantially the same. Appendix, *infra,* p. 21.)

Petitioner contends that Illinois was the source of part of its receipts. That is not the case, for that merely was where the petitioner incurred certain *expenses.* For example, it would be well to examine the various items of expense contained in the findings of the Court below. Each item contained in the analysis is an *expense* item. It is obvious that petitioner is not here seeking to show, nor is it shown by the schedule, that any of petitioner's receipts are from sources outside Indiana. What petitioner has shown, and all that it has shown, is that it has incurred certain *expenses* outside Indiana, which it is now seeking to *deduct.*

We feel it necessary to point out here that the Indiana tax is upon a privilege *measured by gross receipts,* and it

seems elementary that the General Assembly, in levying the tax, possessed ample power to establish the measure thereof.

The Act specifically states:

> "The term 'gross income' * * * means the gross receipts of the taxpayer * * * without any deductions on account of the return of capital invested, the cost of the property sold, *the cost of materials used, labor cost,* interest, discount, or commissions paid or credited and without any deductions of any kind or character * * *."
>
> Section 1 (m), Chap. 117, Acts of General Assembly of 1937. (The 1933 Act contains substantially the same clause.)

The petitioner has lost sight of the nature of the Indiana tax. It is a privilege tax upon the receipt of gross income. *Miles* v. *Department of Treasury,* 1935, 209 Ind. 172, 199 N. E. 372.

Here the measure of the tax is the gross receipts from contracts completely performed within Indiana. Under the Indiana statute it would not be permitted to deduct from its gross receipts its expenses, even if incurred within Indiana, in determining the tax due. The fact that petitioner had *gross receipts* from Indiana activities (*which here were all of its receipt-producing activities*) rightfully subject it to this state tax.

Petitioner is taxable under the plain terms of the Act. The original Gross Income Tax Act provided that:

> "The term 'gross income' * * * means the gross receipts of the taxpayer received in compensation for personal services and the gross receipts

> of the taxpayer derived from trades, *businesses or commerce,* and the gross receipts from the *sale of property,* tangible or intangible, real or personal, *and service, or any or all of the foregoing* * * *."
>
> Sec. 1 (f) Chap. 50, Acts of General Assembly of 1933, 11 Burns' Ind. Stat. Ann., 1933 Ed., Sec. 64-2601 (f).

The amended Act provides:

> "The term 'gross income' means the gross receipts of the taxpayer received as compensation for personal services * * * and the gross receipts of the taxpayer received from trades, *businesses or commerce* * * * *all receipts from the performance of contracts* * * *."
>
> Sec. 1 (m), Chap. 117, Acts of General Assembly of 1937, 11 Burns' Ind. Stat. Ann., 1933 ed., Pocket Suppl. Sec. 64-2601 (m).

Let us visualize the situation exactly as it is. This petitioner either contends, in effect, that the State of Indiana is taxing its *buying of materials* outside Indiana, or that because it does buy materials outside Indiana for use within this state, that the state is thereby precluded from levying and collecting a tax measured by the gross receipts from its activities within Indiana.

Petitioner cites the case of *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, involving net income taxes. In the case of *Dravo Contracting Company* v. *James,* 114 Fed. (2d) 242 at 246, cert. den. 61 S. Ct. 450, the Court had this to say with reference to the *Hans Rees' Sons case*:

> "It constitutes no authority for the proposition that the state may not impose a tax on the basis

> of income received from payments made upon the delivery or construction within the state because work may have been done in other states upon the materials prior to their delivery. The holding in the *Hans Rees'* case is that a state income tax, if upon a unitary enterprise conducted in several states, is void if it allocates an unreasonable portion of the income to the taxing state. The tax here is not upon a unitary enterprise conducted in several states, but upon the business of contracting within West Virginia, and income derived from that business is properly subject to taxation by the state."

In discussing the case of *South Carolina Power Co.* v. *South Carolina,* 52 Fed. (2d) 515, 288 U. S. 178, the Court went on to say at p. 247:

> "Just as it was there held that a state may tax what is carried on within its borders, although this may be dependent upon transactions extending beyond them, so also the power to tax income derived from contracting within the state is not affected by the fact that materials may have been brought from without the state, or that they may have been prepared without the state by the contractor for use under the contract. Only where income arising from a contract performed within the state accrues upon a separable out-of-state transaction should it be excluded as not being income arising from contracting within the state."

Cf. *Indiana Farmers Guide* v. *Department of Treasury,* 217 Ind. 627, 639, 29 N. E. (2d) 781.

Respondents submit that no portion of the activities taxed occurred outside the jurisdiction of the State of Indiana, and therefore, that the tax was properly collected.

The petitioner cites, in support of its proposition that the instant taxes are not proper because of the due process clause of the Fourteenth Amendment to the Constitution, several cases which may be divided into two groups: first, those in which the tax being considered was a *net income tax*, and, second, those in which the levy being considered was a corporate franchise levy.

It is the position of respondents here that neither class of authority should control these actions involving a state privilege tax measured by gross receipts.[3]

The case of *Jackling v. State Tax Commission*, 40 N. M. 241, 58 P. (2d) 1167, cited by petitioner, for the purpose of defining "source" contains the following language which perfectly described petitioner's receipts here as being from Indiana sources:

> "A place where something is found or whence it is taken or derived."
>
> (58 P. (2d) at 1171.)

Certainly, petitioner's receipts are not *"found"* or *"taken"* in Illinois, but in Indiana.

The case of *Connecticut General Life Insurance Company* v. *Johnson*, 303 U. S. 77, cited by petitioner in its brief at pages 18 and 38 thereof, involved a factual situation where the taxpayer was found to have done nothing whatever in the taxing jurisdiction and, hence, there was no local privilege exercised for which the tax might lawfully have been exacted.

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[3] Cf. *In re Kansas City Star*, 346 Mo. 658, 142 S. W. (2d) 1029 at 1037; *Sonneborn Bros. v. Cureton*, 262 U. S. 506; *Swift v. U. S.*, 196 U. S. 375.

As the Court there said:

> "*All* that appellant did in effecting the reinsurance was done outside the state and for its transaction no privilege or license by California was needful."
>
> (303 U. S. at p. 82.)

The state is free to pursue its own fiscal policies, unembarrassed by the constitutional limitations herein sought to be invoked, because the State of Indiana has here exerted its power in relation to opportunities which it has given and to protection which it has afforded. *Wisconsin* v. *J. C. Penney Co.*, 1940, 311 U. S. 435, 444; *Nelson* v. *Sears, Roebuck & Co.*, 1941, 312 U. S. 359, 364.

The State of Indiana in these cases has not taxed any event or transaction which took place in another state; contrariwise, the levy is upon taxable events occurring in Indiana, and not elsewhere, and measured by the gross receipts from those sources. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, Cf. *Stone* v. *York Ice Machinery Corp.* (Miss.), 10 So. (2d) 380.

The thing which the statute authorizes as the taxable event, is the transaction which occurs within Indiana in one of two things, either doing business within the state or deriving income from a source within the state. Both of these things this petitioner did.

And, the fact that physical receipt of the income may have occurred without Indiana will not permit petitioner to avoid this tax. *Department of Treasury* v. *Wood Preserving Corp.*, 1941, 313 U. S. 62, 67.

Three.

Petitioner taxpayer was properly taxable at the rate of one per cent.

Petitioner errs in supposing that the case of *Oster v. Department of Treasury,* 1941, 219 Ind. 313, 37 N. E. (2d) 528, has any application here. The facts there were that the taxpayer was engaged in fashioning coats and cloaks and other products out of materials which belonged to a Chicago concern, which concern was engaged in the business of selling such finished products. The receipts of the taxpayer were derived from processing of materials which did not belong to him. There was never any transfer of title or ownership of any of the materials, and the work done by Oster was admittedly in the nature of manufacturing.

However, here petitioner is engaged in Indiana in doing certain specified work and furnishing certain specified materials. Its gross income is derived directly from the performance of its contracts in Indiana. Its activities in that regard are not within the ordinary meaning of "manufacturing" and, if there is a sale of the materials involved there is no question but that the sale is to the ultimate and final consumer, and, as such, a retail sale under this statute (*Adams Mfg. Co. v. Storen,* 212 Ind. 343, 7 N. E. (2d) 941, reversed on another point: 304 U. S. 307). Such receipts are properly taxable at the basic rate of one percent.

Section 3 (a) of the original Gross Income Tax Act (Chap. 50, Acts of General Assembly of 1933, p. 391) does not apply, for petitioner is not engaged in nor does it derive receipts from any business described therein.

The section of the Act relied upon by petitioner has been construed, administratively and judicially, to include only "manufacturing". It has never been construed to include such receipts as are involved herein.[4]

Under the tax statute, one percent is the general and basic rate. Certain enumerated types of receipts are taxable at a lesser rate. Petitioner comes within no exception from the basic rate and is, therefore, properly taxable at the one percent rate.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] Cf. *Department of Treasury v. Ridgely*, 1936, 211 Ind. 9, 4 N. E. (2d) 557; *Clark's Laundry & Dry Cleaning Co. v. Department of Treasury*, 1937, 103 Ind. App. 359, 5 N. E. (2d) 683; *Suabedissen-Wittner Dairy, Inc. v. Department of Treasury*, 1938, 105 Ind. App. 626, 16 N. E. (2d) 964.

APPENDIX.

PERTINENT SECTIONS OF THE ORIGINAL GROSS INCOME TAX ACT:

"(f) The term 'gross income,' * * * means the gross receipts of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding and accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, * * * without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses. * * *"

Sec. 1 (f), Chap. 50, Acts of General Assembly of 1933.

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupation and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Sec. 2, Chap. 50, Acts of General Assembly of 1933.

"(a) Upon the entire gross income of every person engaged in the business of manufacturing, compounding, or preparing for sale, profit, or use, any article or articles, substance or substances, commodity or commodities; or in the business of mining and/or producing for sale, profit, or commercial use any oil, natural gas, stone, coal, sand, gravel or other mineral product, or felling and producing timber, for sale, profit or commercial use; or in agriiulture, including the production of live stock, poultry, eggs, or any other product of the farm, orchard, garden or greenhouse, one-fourth of one per cent.

Sec. 3 (a), Chap. 50, Acts of General Assembly of 1933.

"(f) Upon the gross income of every person engaged in any business or activity not enumerated in subsections (a) to (e), inclusive, of this section, including, but not in limitation of the foregoing, the gross income from professional services, personal services, sales of real estate, all funds received for the performance of contracts, all funds from the investment of capital, and all receipts from any source whatsoever, one per cent."

Sec. 3 (f), Chap. 50, Acts of General Assembly of 1933.

PERTINENT SECTIONS OF THE AMENDED GROSS INCOME TAX ACT:

"(m) The term 'gross income', * * * means the gross receipts of the taxpayer * * * received from trades, businesses, or commerce, including admission fee or charges, and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets, or from the assignment or sale of rights, all receipts received from the performance of contracts, all receipts received

as prizes and premiums, all receipts received from insurance, all amounts received as alimony, damages, or judgments, and all receipts received by reason of the investment of capital, * * * without any deductions on account of the return of capital invested, the cost of the property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited, or any other expense whatsoever paid or credited, and without any deductions on account of losses, and without any other deductions of any kind or character * * *"

Sec. 1 (m), Chap. 117, Acts of General Assembly of 1937.

"Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other sources within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Sec. 2, Chap. 117, Acts of General Assembly of 1937.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

INTERSTATE ROOFING & SUPPLY COMPANY,
Petitioner,
v.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, AS AND CONSTITUTING THE BOARD OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Respondents.
No. 165

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

INTERSTATE ROOFING & SUPPLY COMPANY, *Petitioner,* *v.* DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, AS AND CONSTITUTING THE BOARD OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, *Respondents.*	No. 165

PETITIONER'S REPLY BRIEF

Petitioner had no factory or place of business in Indiana and the transactions were consummated and paid for in Illinois. The installation in Indiana of materials brought across the State line after they had been purchased from petitioner in Illinois was merely incidental to the whole interstate transaction.

Petitioner contends that, under these facts, interstate commerce exempted the entire transaction from State tax-

ation. The incidental feature of applying the purchased goods cannot convert an interstate transaction into an intrastate transaction.

If it is possible that both interstate and intrastate transactions took place, this Court should be informed that Respondents' elision of a part of the Record on their page two materially understates facts favorable to petitioner. We refer to Respondents' omission of Finding XI (Record p. 27), which discloses petitioner's offer to the State of Indiana to apportion the taxes on the basis of the activities in the respective States. This timely written offer of petitioner preceded by nearly two years any request for information, and even preceded by many months the institution of this suit.

This fact is germane and important because the Court said in an opinion written by Chief Justice Hughes in the *Ingram* case (Indiana) (313 U. S. 252, 255) in overruling the Circuit Court of Appeals:

> "Moreover, if the transportation of the metal parts were regarded as an item of service for which a deduction should have been allowed, we think that it was the duty of respondent, in view of the fact that it was conducting an intrastate business clearly subject to the tax, *to claim the deduction* and show the amount which should be allowed. It does not appear that respondent did either. Respondent made its claim for a total exemption from the tax upon the ground that it was laid upon interstate sales, a contention which it has failed to support."
>
> "The State contends, citing provisions of the taxing act, that the legislature of Indiana contem-

> plated that the taxpayer would reflect in the tax return any deductions claimed, making a separation between taxable and non-taxable items, and that the tax return itself provided a method for claiming any deductions to which the taxpayer thought itself entitled. Respondent insists that the Act did not provide a method of apportionment. In the absence of an *effort* on the part of respondent to present a claim for deduction and to have the state authorities pass upon the question of deduction or *apportionment*, as distinguished from its claim for a total exemption, we are not called upon to attempt to resolve the question of state law."

In commenting on the misapprehension of the Court below, the Court said *id.* p. 254:

> "* * * The court thought that the reasoning of our opinion in *Gwin, White & Prince v. Henneford*, 305 U. S. 434, applied. That case, however, presented a different situation. The business there was that of a marketing agent for a federation of fruit growers and the state tax was measured by the gross receipts of the taxpayer from the business of marketing fruit shipped from the taxing State to the places of sale in other States and foreign countries."

The Court found (*supra*) that all that was done—the service—was "in aid of the shipment and sale of merchandise in that commerce * * * and hence the service was held to be within the protection of the commerce clause." Under "The Nature of the Case," as stated by Respondent's Brief, page 4, we find:

> "* * * Salesmen were sent into Indiana who solicited orders for such work. * * *

> The gross receipts of petitioner from the furnishing and installation [application] of such materials in Indiana upon structures located within said state form the measure of the taxes in controversy here."

A sale was made across the State line, the purchased goods were shipped on the truck of the petitioner to the purchaser in Indiana, immediately applied to his home and the purchase price later sent by him to the company's office in Illinois—clearly an interstate transaction, where the service rendered in Indiana was, to use the Court's words, "in aid of the shipment and sale of merchandise in that commerce." Ergo, the transaction should be free of taxation by the State of Indiana. But, in the event that the Court should not grant refund of the *entire* tax, we call attention to the first portion of the quotation from the Court's decision in the *Ingram* case, and to Finding XI (Record p. 27) showing that the "effort" on the part of petitioner to claim a "deduction or apportionment" was submitted to the Treasury Department in writing, by letter of the petitioner dated January 6, 1940 (more than a year before the starting of the suit), and fifteen months before the decision in the *Ingram* case, in which the State for the first time, so far as we are aware, raised the point that apportionment should have been "claimed." The letter shows, that not only was apportionment "claimed" at that early date, but shows also, that the Department admitted that the transactions "would have been purely interstate commerce" if no work had been done in Indiana, and also suggests that the out-of-Indiana and inside-Indiana activities were approximately equal in amount,

and offering to "pay now on that basis if so assessed (figures to be more definitely determined later, if desired). This segregation of the amounts was suggested tentatively by your field man and would seem to be in accord with the decisions of the court." All the elements required to secure apportionment (lacking in the *Ingram* case) seem to have been anticipated by the Interstate company.

The choice by a State of a particular method of taxation (here a gross income tax) carries with it certain disadvantages as well as advantages. The disadvantages of a gross income tax prevent Indiana from the collection of a tax where the transaction arose and was consummated in Illinois (where most of the activities occurred) and where materials were taken across the State line and paid for in Illinois. Any activities in Indiana *incidental* to the main transaction in Illinois do not deprive the sale of the protection of the commerce clause.

Respondents have ignored the fact that the tangibles involved in the sale to the Indiana householder were transported across the State line by petitioner's own truck and were immediately applied on the home of the buyer, thus meeting every requirement to make the sale exempt from Indiana taxation under the Federal commerce clause.

There has been confusion in Respondents' citation of cases. The decisions applying to one method of taxation do not necessarily apply to another method of taxation merely because they are "tax-cases." The *Berwind-White* case (309 U. S. 33) applying to a buyer's tax under the New York City act can hardly apply to a gross receipts tax act. The only place a buyer's tax could apply (as in

the *Berwind-White* case) is at the location of such buyer. The fact that the *buyer* must pay the tax does *not* (as here sought) compel a *seller* to pay a gross income tax on a transaction in commerce. One kind of a tax cannot borrow, from another kind of a tax, advantages without taking, likewise, the disadvantages. The Indiana gross receipts tax, exacts the tax on transactions within Indiana, but it cannot reach beyond the confines of Indiana and impose the tax upon non-resident's major transactions outside of the State of Indiana. Nor can Indiana, because of minor incidents within the State, drag in the major portion of the out-of-State operations for the purpose of applying its tax to the foreign transaction. The tail should not wag the dog. Indiana could not attach to a gross receipts tax the advantages of a *buyer's* tax whereby she could require non-resident vendors to collect the tax from the citizens of her State as though she had a buyer's tax, and by the same token—not having a buyer's tax (and that is the crux of the *Berwind-White* case) the effort of Indiana to impose, on what is clearly interstate commerce, benefits of the shrewdly drawn New York City tax act, must fail. The activities taxed in the New York City case were *buyer's* activities and Indiana cannot under a gross income, tax *seller's* activities (mostly occurring in Illinois) and which, in Indiana, were merely incidental to the interstate sale (305 U. S. 434, 437).

The Supreme Court of Indiana, as this Court has so frequently said, speaks with final authority on the application of its taxing statute. The Supreme Court of Indiana *has* so spoken on transactions similar to the one in ques-

tion here, in the case of *Department of Treasury v. International Harvester Company* (47 N. E. 2d, 150, 152). Therein the Supreme Court of Indiana said:

> "[7] The appellants would have us construe the statute as exempting only income derived entirely from activities outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was 'derived from sources within the state of Indiana.' Perhaps we should call attention to the fact that § 2 of the Gross Income Tax of 1933 has since been amended. Acts 1937, Ch. 117, § 2, p. 604, § 64-2602, Burns' 1933 (Supp.), § 15982, Baldwin's Supp. 1937."

The transactions had in case at bar were sales outside the State of Indiana, shipments across the Indiana State line, incidental application in Indiana of the product so purchased outside the State of Indiana, and payment therefor also outside the State of Indiana. Petitioner thus did interstate and not intrastate business, reserved by the Federal Constitution for Federal and not State taxation.

CONCLUSION

Petitioner is a resident of Illinois, has no place of business in Indiana, sells its merchandise from Illinois, and sells only merchandise that requires delivery and application. Petitioner makes its own deliveries and application and does not at any time let the merchandise come to rest until after it is taken from the petitioner's truck and immediately applied to the property of the Indiana householder. Payments thereafter are made to petitioner's office in Illinois. It is submitted that this kind of a transaction is definitely interstate and not intrastate business.

May the writ be granted in this case.

Respectfully submitted,

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